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No. 88-1665

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

MARIA BRUEHWILER BREWSTER,
Petitioner,

v.

MARYLAND SECURITIES COMMISSIONER,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF IN OPPOSITION

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

RALPH S. TYLER, III*
SARAH MCCAFFERTY
Assistant Attorneys General
Munsey Building-2nd Floor
7 North Calvert Street
Baltimore, Maryland 21202
(301) 576-6300

Attorneys for Respondent
Maryland Securities Commissioner

*Counsel of Record

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Whether the determination of the Maryland Court of Special Appeals that Petitioner, a broker-dealer agent registered with both the State of Maryland and the National Association of Securities Dealers, Inc. (the "NASD"), engaged in a dishonest or unethical practice in violation of the Maryland Securities Act when she engaged in conduct clearly prohibited by an NASD rule violated Petitioner's right to due process.

2. Whether Petitioner timely raised a claim under the first amendment and, if so, whether the Court of Special Appeals properly held her speech was not protected by the first amendment because it was misleading.

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COUNTERSTATEMENT OF THE CASE

On February 28, 1986, the Maryland Securities Commissioner [hereinafter the "Commissioner"] issued an Order to Show

Cause [hereinafter the "Order"] to the Petitioner, Maria Bruehwiler Brewster, who was at that time an agent registered with the Maryland Division of Securities and the National Association of Securities Dealers, Inc. [hereinafter the "NASD"], and employed by The Stuart-James Company, Inc., a Maryland-registered broker-dealer, at its Columbia, Maryland office.

The action was instituted after Petitioner sold shares of a speculative stock in a company called CXR Telecom to a Maryland couple, Mr. and Mrs. Lang. See Findings of Fact of Hearing Officer (Apx. 36). The administrative record, including the Hearing Officer's undisputed Findings of Fact, shows that:

> [W]hile advocating CXR to Lang, Brewster failed to indicate 'any specific or detailed information . . . about the particular risk factors associated with CXR.' The record further clearly demonstrates that,

> because of Lang's then relatively minuscule financial net worth, Brewster induced him to inflate five fold his net worth in order to facilitate the approval of the trade by Stuart-James, Brewster's employer.

Brewster v. Maryland Securities Comm'r, 76 Md. App. 722, 724-25, 548 A.2d 157, 158 (1988), cert. denied, 314 Md. 496, 551 A.2d 867 (1989) (Apx. 3) (quoting Hearing Officer's Findings of Facts) (footnote omitted).

The Order specifically stated that:

> [R]ecommending to customers the purchase of a low-priced speculative stock that is clearly unsuitable for them in view of their financial position, and encouraging a customer to falsify the amount of his net worth in order to complete such a sale are dishonest and unethical practices prohibited by §11-412(a)(7) of the Maryland Securities Act, . . . and also violate §2 of the Rules of Fair Practice of the National Association of Securities Dealers, Inc.

Order to Show Cause (Apx. 59).

The Commissioner's final order fined Petitioner $100 and suspended her

agent registration for 30 days. 76 Md. App. at 724, 548 A.2d at 158 (Apx. 18). Petitioner has stated in her petition that "she is not challenging the Maryland Court's findings that her suggestion to the customer to inflate his net worth merited sanctions." Petition for Writ of Certiorari at 5.

REASONS FOR DENYING THE WRIT

SUMMARY

Further review of this case is plainly unwarranted. The Petition fails to present a substantial federal question or any novel or unsettled questions on which the federal or state courts require the guidance of this Court. The decision of the Court of Special Appeals of Maryland (hereinafter the "Court of Special Appeals") is consistent with prior decisions of this

and other courts. No sound reason exists for disturbing the well-reasoned decision of the Court of Special Appeals.

I. NO SUBSTANTIAL FEDERAL QUESTION IS RAISED BY THE PETITION.

Petitioner has raised two questions for review: 1) whether on the facts of this case, the application of §11-412(a)(7) of the Maryland Securities Act violated Petitioner's due process rights and 2) whether Petitioner's first amendment rights were violated. The Court of Special Appeals properly applied existing Supreme Court precedent to these issues and correctly rejected both arguments. Because the questions themselves present no important question of federal law and were properly decided by the state court, the Petition should be denied.

A. Application of §11-412(a)(7) of the Maryland Securities Act Did Not Violate Petitioner's Due Process Rights.

Petitioner claims that because the term "unsuitable" in the Commissioner's Order was not defined to her satisfaction, the application of §11-412(a)(7) of the Maryland Securities Act to her conduct violates her due process rights under the fourteenth amendment to the United States Constitution. This argument was properly rejected by the administrative agency charged with enforcement of this technical registration provision, as well as by the Circuit Court for Baltimore City and the Court of Special Appeals. It is without merit and need not be considered again.

Article III, §2 of the Rules of Fair Practice of the NASD provides:

> In recommending to a customer the purchase, sale or exchange of any security, a member shall have reasonable grounds for believing that the recommendation is suitable for such customer upon the basis of the facts, if any, disclosed by such customer as to his other security holdings and to his financial situation and needs.

Article III, §2 (Apx. 67), quoted in Brewster v. Maryland Securities Comm'r, 76 Md. App. at 726-27, 548 A.2d at 159 (Apx. 6). This NASD rule is a well-known restatement of the suitability rule, a basic concept in the securities industry.

There are many administrative and judicial decisions addressing the issue of "suitability," as both the Hearing Officer and the final decision maker concluded. See, e.g., Erdos v. Securities and Exchange Comm'n, 742 F.2d 507, 508 (9th Cir. 1984); In re Boren &

Co., 40 S.E.C. 217 (1960); In re Philips & Co., 37 S.E.C. 66 (1956). Moreover, as an agent registered with the NASD, Petitioner knew or certainly should have known of the NASD suitability rule that governs the broker-dealer industry, "having passed a test concerning [the NASD] rules." Brewster, 76 Md. App. at 727, 548 A.2d at 160; see id. at 728, 548 A.2d at 160 (Apx. 7; see Apx. 7-8). The Court of Special Appeals noted that it was "beyond question but that Brewster read the Compliance Manual of her employer, Stuart-James," which twice reprints Article III, §2 of the NASD Rules of Fair Practice and also includes a specific discussion of each agent's responsibility for fair dealing with customers and others. Id. at 726, 548 A.2d at 159 (Apx. 5-6). There can be no

serious question that Petitioner was well aware of the suitability concept.

The administrative agency and both reviewing courts properly followed existing Supreme Court precedent that a broad statutory standard, such as that found in §11-412(a)(7) of the Maryland Securities Act, "is not vague if it has a meaningful referent in business practice, custom, or usage." See, e.g., id. at 728, 548 A.2d at 160 (quoting United States v. Nat'l Dairy Products Corp., 372 U.S. 29 (1963)) (Apx. 8). Each determined that the term "dishonest and unethical" has such a meaningful referent in business practices and usage, embodied in both the NASD's Article III, §2 and Petitioner's employer's own Compliance Manual. See id. at 729, 548 A.2d at 160 (Apx. 8).

At each level of review, Petitioner's due process claim has been carefully considered and properly rejected under existing Supreme Court case law.

B. Petitioner's First Amendment Rights Were Not Violated.

Petitioner's first amendment argument is patently frivolous and has been considered and rejected by both the Circuit Court for Baltimore City and the Court of Special Appeals based upon this Court's ruling in Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557 (1980).[1] The

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[1] Petitioner's first amendment argument was raised for the first time during appeal to the Circuit Court for Baltimore City after briefing to that court, during oral argument. Therefore, Respondent maintains, and has maintained both at the Circuit Court level and before the Court of Special Appeals, that Petitioner's first amendment argument was waived and should not be entertained on appeal or petition for (Continued)

courts below properly ruled that Petitioner's speech did not meet even the first prong of this Court's test in Central Hudson -- that the commercial speech concern lawful activity and not be misleading. As the Court of Special Appeals pointed out, Petitioner's statement to the Maryland resident in question "with respect to the purchase of CXR stock and the inherent risk factors involved were, at least, misleading." Id. at 731, 548 A.2d at 161 (Apx. 11). Thus, the Court of Special Appeals properly concluded, as had the circuit court below, that Petitioner's statements were not protected by the first amendment. Id., 548 A.2d at 161 (Apx. 11).

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review. See Maryland State Retirement and Pension Systems v. Martin, 75 Md. App. 240, 248, 540 A.2d 1188, 1191 (1988); Chertkof v. Department of Natural Resources, 43 Md. App. 10, 15-18, 402 A.2d 1315, 1318-20 (1979).

II. THE DECISION OF THE COURT OF SPECIAL APPEALS IS CONSISTENT WITH PRIOR DECISIONS OF THIS AND OTHER COURTS.

Both issues raised in the Petition were decided by the Court of Special Appeals in accordance with the decisions of this Court. The Petition does not demonstrate that this decision is contrary to the applicable decisions of this Court or decisions from other courts on similar issues. Although Petitioner claims that the Court of Special Appeals should have applied this Court's decision in United States v. L. Cohen Groceries Co., 255 U.S. 81 (1921), rather than the Court's more recent decision in United States v. National Dairy Products Corp., 372 U.S. 29 (1963), to her due process claim, in fact the test in both these decisions is the same.

In both Cohen and National Dairy Products this Court considered whether the statutory provision in question was so vague that it violated the due process requirement of the fifth amendment. National Dairy Products, 372 U.S. at 31; see Cohen, 255 U.S. at 89. This Court in National Dairy Products, like the Court of Special Appeals below, found that the provision in question did give the necessary notice, and expressly distinguished Cohen, noting that the standard held too vague in that case "was without a meaningful referent in business practice or usage." 372 U.S. at 36. "'There was no accepted and fairly stable commercial standard which could be regarded as impliedly taken up and adopted by the statute . . .'" Id. (quoting A. B. Small Co. v. American Sugar Refining Co., 267 U.S. 233, 240-41

(1925)). In contrast, in this case, as in National Dairy Products, id., there is a meaningful and well-known standard applicable to Petitioner's actions as a registered agent in this highly regulated industry. Thus, Petitioner's argument is incorrect.

Conclusion

Respondent respectfully urges the Court to deny the petition for a writ of certiorari.

Respectfully submitted,

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

RALPH S. TYLER, III*
SARAH McCAFFERTY
Assistant Attorneys General
Munsey Building - 2nd Floor
7 North Calvert Street
Baltimore, Maryland 21202
(301) 576-6300

Attorneys for Respondent
Maryland Securities
Commissioner

*Counsel of Record

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of May, 1989, three copies of Respondent's Brief in Opposition were sent by first class mail, postage prepaid, to Donald T. Trinen, Esquire, Christa D. Taylor, Esquire, Hart & Trinen, 1624 Washington Street, Denver, Co. 80203, Counsel for Petitioner.

Ralph S. Tyler, III
Counsel of Record for
Respondent